

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

PRESTIGE LIMITED PARTNERSHIP
CONCORD, a California Limited
Partnership,

Debtor.

Case No. 95-57967-JRG
Chapter 11

PRESTIGE LIMITED PARTNERSHIP
CONCORD, a California Limited
Partnership,

Plaintiff,

vs.

Adversary No. 96-5281

**ORDER DENYING REMAINDER OF
MOTION FOR SUMMARY JUDGMENT
AND ORDER OVERRULING
OBJECTION TO CLAIM**

EAST BAY CAR WASH PARTNERS, a
California Limited
Partnership,

Defendant.

I. INTRODUCTION

Before the court are the remaining issues contained in plaintiff's motion for summary judgment which the court has not previously considered.¹ These issues also encompasses the

¹ Plaintiff's motion for summary judgment contains three issues which are discussed later in this decision. The court previously ruled on the first and second issues but did not consider the third issue as it did not find the issue to be properly before it. The court will now address the third issue of whether East Bay has an unsecured claim in the bankruptcy case.

1 objection to defendant's proof of claim filed by plaintiff.
2 Plaintiff seeks a determination that defendant East Bay has no
3 claim of any type in the bankruptcy case. For the reasons
4 hereinafter stated, the remainder of plaintiff's motion for
5 summary judgment is denied and plaintiff's objection to
6 defendant's claim is overruled.

7 **II. BACKGROUND**

8 The underlying facts are not disputed. The debtor and
9 plaintiff in this adversary proceeding is Prestige Limited
10 Partnership, a California limited partnership. Prestige's
11 General Partner is Mesa Full Service Car Wash Partners, which is
12 an Arizona limited partnership. The General Partners of Mesa
13 are several individuals, one of which is Jerry Brassfield.
14 Jerry Brassfield is also the purported guarantor of the
15 promissory note which is at issue in this case.

16 In July 1990, Prestige purchased a car wash business from
17 defendant East Bay. The purchase price was \$2,850,000, which
18 was paid by (1) \$500,000 cash; (2) financing through San Jose
19 National Bank in the amount of \$780,000; and (3) a seller carry-
20 back loan of approximately \$1,573,000. A ground lease was also
21 assigned to Prestige as part of the sale. The seller carry-back
22 loan was evidenced by a promissory note to East Bay (hereafter
23 referred to as the "1st Note"), and was secured by Prestige's
24 ground lease, as well as personal property and equipment. The
25 1st Note was executed by Prestige's General Partner, Mesa Car
26 Wash Limited Partnership, as evidenced by the signatures of
27 Mesa's three individual General Partners, including Jerry
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1 Brassfield. The 1st Note also contained a guaranty provision
2 which provided: "This Promissory Note, including all of
3 Trustor's obligations to pay principal and interest are hereby
4 personally guaranteed by Jerry G. Brassfield dba J.G. Brassfield
5 Enterprises." Jerry Brassfield executed the 1st Note in his
6 capacity as General Partner of Mesa, and also as Guarantor in
7 his individual capacity and dba "J.G. Brassfield Enterprises."

8 In September 1991, the 1st Note was split into two notes--
9 (1) an \$800,000 Note (hereafter the "2nd Note"), which contained
10 the same guaranty language as the 1st Note, and was secured by
11 the ground lease; and (2) a Note for \$773,000 (hereafter the
12 "3rd Note"), which was also secured by the ground lease and
13 contained the same guaranty language as the other notes. The
14 2nd Note was subsequently assigned and is not at issue. It is
15 the 3rd Note which is at issue in this case.

16 There is no dispute that the 1st Note was a purchase money
17 Note;² nor is it disputed that the subsequent division of the 1st
18 Note did not change the character of the 2nd and 3rd Notes as
19 purchase money notes.³ Prestige also cites to case law providing
20 that if a debt is originally a purchase-money debt, the note
21 evidencing the debt is also a purchase-money debt, even if it is
22 not the original note. Jackson v. Taylor, 272 Cal.App.2d 1, 76
23 Cal.Rptr. 891 (1969); Lucky Inv. v. Adams, 183 Cal.App.2d 462, 7
24 Cal.Rptr. 57 (1960).

25 The 3rd Note became due in October 1993, but the parties

26
27 ² East Bay admitted this fact in its Answer.

28 ³ East Bay also admitted this fact in its Answer.

1 agreed to extend the maturity date to October 1, 1995. Prestige
2 subsequently attempted to obtain a further extension of the Note
3 due date but was unsuccessful. In October 1995, East Bay
4 commenced an action on the guaranty against Jerry G. Brassfield,
5 individually and dba J.G. Brassfield Enterprises. Brassfield
6 raised as an affirmative defense in his answer that the relief
7 sought by the complaint was a violation of the single action
8 rule of California Code of Civ. Proc. § 726(a). Nevertheless,
9 East Bay obtained temporary protective orders against
10 Brassfield, and in March 1996, and April 1996, obtained writs of
11 attachment. East Bay levied on the writs of attachment in April
12 1996 and attached \$74,960.51 of funds held in Brassfield's
13 unpledged bank accounts.

14 Prestige filed its petition for bankruptcy under Chapter 11
15 of the Bankruptcy Code on December 1, 1995 and listed East Bay
16 in its schedules as the holder of a disputed secured claim. On
17 April 25, 1996, Prestige filed this action, a Complaint to Avoid
18 Lien and Declare Obligation to Defendant to be Unenforceable.
19 On May 30, 1996, Prestige filed a motion for summary judgment.
20 The motion set forth three issues:

- 21 1. The first issue is whether Jerry Brassfield, as the
22 general partner of Prestige's general partner Mesa, is
23 a primary obligor under the 3rd Note, such that the
24 purported "guaranty" added no additional liability, and
Prestige may assert that, by proceeding against Jerry
Brassfield, East Bay has taken its "action" under
Calif. Code of Civ. Proc. § 726(a).
- 25 2. If Jerry Brassfield is found to be a primary obligor
26 under the 3rd Note, the second issue presented is
27 whether East Bay's attachment and levy of Brassfield's
28 unpledged bank accounts constitutes an "action" for
purposes of California Code of Civ. Proc. § 726(a),
resulting in a waiver of East Bay's security interest

1 in Prestige's ground lease.

- 2 3. If the court answers the first and second issues in the
3 affirmative, the third issue presented is whether East
4 Bay has any claim in Prestige's bankruptcy case. If
5 plaintiff's contention is correct that, by proceeding
6 against Brassfield, East Bay made an election of
7 remedies and waived its lien against debtor's ground
8 lease, East Bay could have only an unsecured claim in
9 the debtor's case. However, Prestige contends that
10 since East Bay did not file a timely proof of claim, it
11 does not even have an unsecured claim.

12 On January 29, 1997, the court entered an Order Granting
13 Partial Summary Judgment. With respect to the first issue the
14 court found that Jerry Brassfield was a primary obligor on the
15 note and that East Bay has taken its "action" under Calif. Code
16 of Civ. Proc. § 726(a). On the second issue the court found
17 that East Bay's action resulted in a waiver of East Bay's
18 security interest in Prestige's ground lease. The court did not
19 consider the third issue of whether East Bay has an unsecured
20 claim as it did not find the issue to be properly before it.

21 The Order Granting Partial Motion for Summary Judgment is
22 presently on appeal. See Prestige Limited Partnership Concord
23 v. East Bay Car Wash Partners, 205 B.R. 427 (Bankr. N.D.Cal.
24 1997). Once a party properly files a notice of appeal, the
25 trial court loses jurisdiction over reconsideration of those
26 issues addressed in the appeal. Griggs v. Provident Discount
27 Co., 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982).
28 However, the trial court may consider issues that are not before
the appellate court. Marrese v. American Academy of Orthopedic
Surgeons, 470 U.S. 373, 379, 105 S.Ct. 1327, 84 L.Ed.2d 274
(1985).

1 The court is now asked to determine whether East Bay has an
2 unsecured claim in the bankruptcy case. On May 3, 1996, East
3 Bay filed a proof of claim in the main bankruptcy case.
4 Prestige has filed an Objection to East Bay's Claim. The first
5 hearing on the objection to claim was set for August 8, 1997.
6 The hearing on the objection was consolidated with the remaining
7 issues in the summary judgment motion dealing with the validity
8 of the unsecured claim.

9 **III. ISSUES PRESENTED**

10 The ultimate issue is whether East Bay has any claim
11 against Prestige in the bankruptcy case. To make this
12 determination three issues need to be addressed:

- 13 1) Prestige argues that East Bay's unsecured claim must be
14 disallowed because it is not timely filed.
- 15 2) Prestige also argues that East Bay unsecured claim must
16 be disallowed because the violation of § 726(a) of the
17 California Code of Civil Procedure leads to the loss of
18 both East Bay's security and its unpaid debt.
- 19 3) Finally, Prestige argues that East Bay's claim must be
20 disallowed because the underlying note is a non-
21 recourse purchase money note and is therefore
22 unenforceable pursuant to § 580b of the California Code
23 of Civil Procedure.

24 **IV. APPLICABLE LAW ON MOTION FOR SUMMARY JUDGMENT**

25 Plaintiff has moved for summary judgment under Federal Rule
26 of Civ. Proc. 56, which is made applicable to this adversary
27 proceeding by Federal Rule of Bankruptcy Procedure 7056.

28 Summary judgment is appropriate where no genuine issue of
material fact exists and a party is entitled to prevail in the
case as a matter of law. Fed.R.Civ.P. 56(c); Bhan v. Nme

1 Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir. 1991), cert.
2 denied, 502 U.S. 994 (1991), citing, Anderson v. Liberty Lobby,
3 Inc., 477 U.S. 242, 250 (1986).

4 The party requesting summary judgment has the initial
5 burden to show that there are no genuine issues of material
6 fact. Bhan v. Nme Hospitals, Inc., 929 F.2d at 1409. The
7 nonmovant's version of the facts must be accepted and all
8 inferences from the underlying and undisputed facts are to be
9 drawn in favor of the nonmovant. Bishop v. Wood, 426 U.S. 341,
10 348 (1976); United States v. Diebold, Inc., 369 U.S. 654, 655
11 (1962).

12 "[The] party seeking summary judgment always bears the
13 initial responsibility of informing the district court of the
14 basis for its motion, and identifying those portions of `the
15 pleadings, depositions, answers to interrogatories, and
16 admissions on file, together with the affidavits, if any,' which
17 it believes demonstrate the absence of a genuine issue of
18 material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323
19 (1986); quoting Fed. R. Civ. P. 56(c). If the moving party
20 satisfies this initial burden, the opposing party must go beyond
21 the pleadings and by affidavit, deposition, answers to
22 interrogatories, and admissions on file, designate specific
23 facts showing that there is a genuine issue for trial. Id. at
24 324.

25 **V. DISCUSSION**

26 **A. EAST BAY TIMELY FILED ITS PROOF OF CLAIM**

27 At the initial hearing on the objection to claim and the
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1 remaining issues in the motion for summary judgment the court
2 made a tentative ruling on the issue of whether East Bay timely
3 filed its proof of claim. The court now adopts its tentative
4 ruling. The court found that East Bay has a timely filed proof
5 of claim under Rules 3002(c)(3) and 3003(c)(3) for the following
6 reasons.

7 Pursuant to Rule 3002(c), an unsecured claim which arises
8 in favor of an entity or becomes allowable as a result of a
9 judgment may be filed within 30 days after the judgment becomes
10 final if the judgment is for the recovery of money or property
11 from that entity or denies or avoids the entity's interest in
12 property.

13 The Committee Note for Rule 3002(c) states that although a
14 claim of a secured creditor may have arisen before the petition,
15 a judgment avoiding the security interest may not have been
16 entered until after the time for filing claims have expired.
17 See Committee Note on Rule 3002. Under Rule 3002(c)(3) the
18 creditor who did not file a secured claim may nevertheless file
19 an unsecured claim within the prescribed time period. Id. A
20 judgment does not become final for the purposes of starting the
21 30 day period until the time for appeal has expired or until an
22 appeal has been disposed of. See Committee Note on Rule 3002
23 citing In re Tapp, 61 F.Supp. 594 (W.D.Ky. 1945).

24 On February 28, 1997, East Bay Car Wash filed a proof of
25 claim for the unsecured debt after this court issued its Order
26 Granting Partial Summary Judgment in favor of Prestige. The
27 appeal of this order is still pending. Hence, East Bay has
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1 filed a timely proof of claim even though it may not even be
2 required to file a proof of claim yet given that the appeal is
3 still pending.

4 In addition, Rule 3003 governs the filing of a proof of
5 claim in Chapter 11 cases. Although Rule 3003(c)(2) would seem
6 to require a secured creditor to file a proof of claim by virtue
7 of the language "Any creditor...whose claim...is not scheduled
8 or scheduled as disputed, contingent, or unliquidated shall file
9 a proof of claim," Collier on Bankruptcy states that a secured
10 creditor need not file a proof of claim, whether or not properly
11 scheduled, or listed as disputed, contingent or unliquidated,
12 unless the creditor desires to pursue an unsecured deficiency.
13 9 Collier on Bankruptcy ¶ 3003.03[3], p. 3003-8 (15th ed. 1997).
14 Rule 3003 also provides that notwithstanding the expiration of
15 time under Rule 3003, a proof of claim may be filed to the
16 extent and under the conditions stated in Rule 3002(c)(3).

17 Thus, East Bay is not required to file a proof of claim
18 until such time its claim is deemed unsecured. Because appeals
19 are pending on the determination of whether East Bay has a
20 secured claim and East Bay has filed a proof of claim, the court
21 finds that East Bay has a timely filed a proof of claim.

22 **B. EAST BAY DID NOT LOSE ITS UNSECURED CLAIM AS A RESULT**
23 **OF VIOLATING C.C.P. § 726(a)**

24 Prestige argues that because East Bay violated the one
25 action rule, it not only lost its security but lost its unpaid
26 debt as well. East Bay responds that this is not a case where
27 such a double sanction should be imposed. The court agrees.
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1 The court finds DiSalvo v. DiSalvo (In re DiSalvo), No.
2 95-02837, 1998 WL 321095 (9th Cir. BAP (Cal.)) controlling as to
3 the imposition of the double sanction urged by Prestige. The
4 Court in DiSalvo held that it is reversible error to also
5 extinguish the debt as a sanction for violating the one action
6 rule.

7 In DiSalvo, the debtor executed a promissory note and a
8 deed of trust on the debtor's residence for \$100,000 in favor of
9 the plaintiff as an equalizing judgment in their marriage
10 dissolution. When the debtor did not pay the \$100,000, the
11 plaintiff began proceedings to execute on the judgment,
12 including obtaining a writ of execution and filing an
13 application to levy on the debtor's assets. After the debtor
14 filed bankruptcy, the plaintiff filed an adversary proceeding
15 seeking a determination that, among other things, the \$100,000
16 equalizing judgment was non-dischargeable. After trial the
17 bankruptcy court found the judgment dischargeable under 11
18 U.S.C. § 523(a)(15).⁴ It also found that plaintiff had violated
19 California's one-action rule (CCP § 726(a)). As a sanction for
20 the violation, the court extinguished the security and the
21 \$100,000 debt.

22 The 9th Circuit BAP stated that through plaintiff's pre-
23 petition collection actions, the plaintiff elected her remedy
24 and is subject to sanctions for her violation of § 726(a). Id.

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26 ⁴ In a footnote, the BAP opinion noted that the bankruptcy court's
27 ruling that the judgment is dischargeable was not challenged on the appeal.
28 The BAP further stated that "Accordingly, the debt may be treated as any other
unsecured debt in a plan of reorganization." See DiSalvo v. DiSalvo (In re
DiSalvo), No. 95-02837, 1998 WL 321095, at *1 (9th Cir. BAP (Cal.)).

1 at *4. However, the appropriate sanction is loss of the
2 security, not loss of the security and loss of the debt. Id.
3 The court stated that the debt is not affected by the
4 plaintiff's violation of § 726(a). Id.

5 Based on DiSalvo, the court finds that the appropriate
6 sanction for East Bay's violation of the one action rule is the
7 loss of its security only.

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9 **C. EAST BAY'S NOTE IS NOT UNENFORCEABLE BASED ON § 580b OF
THE CALIFORNIA CODE OF CIVIL PROCEDURE**

10 Prestige fashions a final argument in its attempt to punish
11 East Bay with a double sanction. Prestige contends that East
12 Bay's violation of the one action rule cost East Bay its
13 security and California's anti-deficiency statute (CCP § 580b)
14 should now be used to eliminate the unpaid debt. For the
15 following reasons, the court finds that § 580b is inapplicable
16 to this case.

17 Prestige argues that under § 580b, a purchase money secured
18 creditor is limited to its security and cannot obtain a personal
19 judgment for any deficiency on the Note. This is a correct
20 statement of the law. However, East Bay is not requesting that
21 the court grant it a deficiency judgment. It would be
22 impossible for the court to do so.

23 A "deficiency" by definition is "that part of a debt
24 secured by mortgage not realized from sale of mortgaged
25 property." See Black's Law Dictionary, p. 421 (Sixth Ed. 1990).
26 Sections 580a and 580b of the California Code of Civil Procedure
27 relate to an action for a deficiency judgment after foreclosure
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1 or trustee's sale. Section 580a is entitled "Action for
2 deficiency judgment after foreclosure or trustee's sale;
3 complaint; appraisal; deficiency computed on basis of fair
4 market value; limitation of actions; necessity of sale."
5 Section 580b entitled "Purchase money mortgages, etc.; no
6 deficiency judgment" provides in part:

7 No deficiency judgment shall lie in any event **after a**
8 **sale** of real property... for failure of the purchaser
9 to complete his or her contract of sale, or under a
10 deed of trust or mortgage given to the vendor to secure
11 payment of the balance of the purchase price of that
12 real property. (Emphasis added.)

13 It is obvious that the section contemplates that the creditor
14 will
15 have the opportunity to liquidate its collateral.

16 In this case, there was never a foreclosure or sale and
17 there may never be one since East Bay lost its security.⁵
18 Prestige even admits in this motion that "East Bay cannot
19 foreclose on its real
20 property security." Memorandum of Points and Authorities in
21 Support of Debtor's Motion for Summary Judgment filed on May 30,
22 1996, p. 13. Because § 580b limits repayment of purchase money
23 obligation to the sale of property pledged as security for the
24 loan, and there was no sale, § 580b is not applicable to a
25 determination of whether East Bay has an unsecured claim.

26 This outcome is consistent with the policies that underlie
27 §§ 726 and 580b. In order to understand the relationship between
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, This court found in its Order Granting Partial Motion for Summary
Judgment filed January 29, 1997, that East Bay's action against Brassfield
waived its security interest in Prestige's ground lease. This decision is now
pending appeal.

1 §§ 580b and 726 of the California Code of Civil Procedure, one
2 must look to the overall policy objective behind the two
3 sections. See generally 3 Witkin, Summary of California Law,
4 Security Transactions in Real Property §§ 111-180 (9th ed.
5 1987); Miller & Starr, California Real Estate §§ 9:104-195 (2nd
6 ed. 1975). The objective of the sections is to force the
7 creditor to look to the security as the primary source for
8 payment of the debt before looking to the creditor's other
9 assets.

10 CCP § 726, commonly referred to as the single action rule,
11 mandates one form of action for the recovery of any debt secured
12 by a mortgage or deed of trust on real property. The single
13 action must be a foreclosure. See California Real Estate §
14 9:104. In addition, if a creditor wants a deficiency judgment,
15 the rule contemplates a single action consisting of a two-stage
16 judicial proceeding: the first stage orders the sale of the
17 property, determines the liability for a deficiency and
18 culminates in a foreclosure decree; the second stage establishes
19 the amount of the deficiency. 3 Witkin Summary of California
20 Law, Security Transactions in Real Property § 155 (9th ed. 1987)
21 citing United Calif. Bank v. Tijerina, 25 C.A.3d 963, 968
22 (1972).

23 If the creditor elects a non-judicial foreclosure, a
24 trustee's sale, it cannot obtain a deficiency judgment. The
25 rule is designed to prevent the creditor from commencing an
26 action against the debtor before exhausting its security. If
27 the creditor does not follow this security-first mandate, the
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1 debtor can raise the single action rule as a defense or as a
2 sanction. The debtor can raise the defense that the debt is
3 secured and he can force the creditor to foreclose first. If
4 the debtor does not raise the defense, the creditor is
5 sanctioned by the loss of its security. 3 Witkin Summary of
6 California Law, Security Transactions in Real Property § 119 (9th
7 ed. 1987).

8 Section 580b, commonly referred to as California's anti-
9 deficiency statute, also requires that a creditor look to its
10 security by prohibiting a deficiency judgment entirely. Section
11 580b entitled "Purchase money mortgages, etc.; no deficiency
12 judgment" provides in part:

13 No deficiency judgment shall lie in any event after a
14 sale of real property... for failure of the purchaser
15 to complete his or her contract of sale, or under a
16 deed of trust or mortgage given to the vendor to secure
17 payment of the balance of the purchase price of that
18 real property.

19 Because of the substantive importance of §§ 726 and 580b, a
20 creditor cannot circumvent the requirement of looking to the
21 security first by "waiving" the security and suing the debtor
22 directly on the debt.⁶

23 In effect, when a debtor signs a promissory note, he does
24 not make an unconditional promise to pay the debt; he only makes
25 a conditional promise to pay any deficiency after a judicial
26 sale of the property if the amount received at the sale does not
27 satisfy the debt. Id. In the case of a purchase money
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⁶ The debtor cannot waive the protection of the rules at the time he makes or renews the security obligation. See California Real Estate § 9:104. However, the debtor can subsequently waive the restrictions if he receives separate and independent consideration for the waiver. Id.

1 mortgage, he makes a conditional promise to pay the creditor
2 with any sale of the property. In both cases the debtor still
3 makes a promise to pay something in exchange for ownership of
4 the property.

5 If the debtor elects to prevent or disallow a sale of the
6 property, it cannot argue that the creditor has no other
7 recourse. This would leave the creditor with nothing. This is
8 a double sanction that is not contemplated by the statutes and
9 courts have held that it is inappropriate to impose a double
10 sanction. See In re DiSalvo, No. 95-02837, 1998 WL 321095 (9th
11 Cir. BAP (Cal.)). By preventing the creditor from looking to
12 its security as the statutes require, the debtor is estopped
13 from asserting its protections under the statutes. In effect,
14 there has been an election to allow a deficiency judgment in its
15 place. Otherwise, to disallow a deficiency judgment would be
16 paramount to allowing the debtor to make a promise to pay,
17 receive the property, and not be required to pay for the
18 property. The debtor cannot take the property and leave the
19 creditor with absolutely nothing. This clearly is not the
20 intent of the statutes. The intent is that the creditor look to
21 its security. If it is prevented from doing so, it may not be
22 sanctioned with loss of the debt owed to it.

23 In this case, Prestige is estopped from asserting its
24 protections under the statute. On May 30, 1996, Prestige filed
25 a Motion for Summary Judgment which requested that the court
26 find that East Bay has lost its security interest in Prestige's
27 ground lease. The court granted its request in its Order
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1 Granting Partial Summary Judgment. Now, Prestige requests that
2 the court find that East Bay has no claim whatsoever based on
3 California's anti-deficiency statute CCP § 580b. The court now
4 finds that Prestige is estopped from asserting its § 580b
5 protection by virtue of East Bay being prevented from looking to
6 the security pledged for the debt. Through its motion to impose
7 the sanction of loss of security under the one action rule,
8 Prestige has made an election to allow East Bay to pursue
9 Prestige's other assets to repay the debt. Thus, East Bay's
10 note is not unenforceable based on § 580b and East Bay has not
11 lost its unsecured claim.

12 **V. CONCLUSION**

13 Based on the foregoing, plaintiff's partial motion for
14 summary judgment is denied. In addition, the objection to East
15 Bay's unsecured claim is overruled. The statements in this
16 order shall constitute findings of fact and conclusions of law
17 pursuant to Federal Rule of Bankruptcy Procedure 7052.
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